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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/772,746	02/05/2004	Edward Alan Knudson	49102.3000.I.I	5722
22859	7590	04/01/2005	EXAMINER	
INTELLECTUAL PROPERTY GROUP FREDRIKSON & BYRON, P.A. 200 SOUTH SIXTH STREET SUITE 4000 MINNEAPOLIS, MN 55402			MAYO, TARA L	
		ART UNIT		PAPER NUMBER
		3671		
DATE MAILED: 04/01/2005				

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/772,746	KNUDSON ET AL.	
	Examiner	Art Unit	
	Tara L. Mayo	3671	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) Responsive to communication(s) filed on ____.
 2a) This action is **FINAL**. 2b) This action is non-final.
 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) Claim(s) 1-24 is/are pending in the application.
 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
 5) Claim(s) ____ is/are allowed.
 6) Claim(s) 1-7 9-24 is/are rejected.
 7) Claim(s) 8 is/are objected to.
 8) Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) The specification is objected to by the Examiner.
 10) The drawing(s) filed on 05 February 2004 is/are: a) accepted or b) objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 a) All b) Some * c) None of:
 1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. ____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. ____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date ____. | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| | 6) <input type="checkbox"/> Other: ____. |

DETAILED ACTION

Specification

1. The prior objection to the Specification set forth in the last Office action mailed 02 September 2004 has been overcome by the response filed 03 January 2005 amending the Abstract.

Claim Rejections - 35 USC § 103

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. Claims 13 through 15 and 19 through 24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Willemsen (U.S. Patent No. 5,832,687).

Willemsen '687, as seen in Figures 1 through 3, discloses a deterioration resistant retaining wall comprising a plurality of blocks positioned side-by-side and stacked to form a continuous retaining wall (col. 1, lines 39 through 46), the blocks (50) comprising: with regard to claim 13,

a top panel (51) of polymeric material (col. 3, lines 4 through 7);
a bottom panel (52) of polymeric material (col. 3, lines 4 through 7);

a wall assembly (53) of polymeric material (col. 3, lines 4 through 7) that is adjoined to the top panel and bottom panel forming a chamber for receiving and retaining one or more fill materials suitable for the growth of vegetation (col. 4, lines 54 through 56);

one or more fill materials (col. 4, lines 54 through 56) suitable for the growth of vegetation administered to the chamber; and

an aperture (66) positioned on the bottom panel (col. 3, lines 61 through 63);

with regard to claim 14,

wherein the polymeric material is plastic;

with regard to claim 15,

wherein the aperture is covered internally or externally by an aperture cover (67);

with regard to claim 19,

wherein the blocks include more than one unit;

with regard to claim 20,

wherein the blocks further include disengaging tabs (the intermittent sections between elements 68);

with regard to claim 21,

wherein the blocks further include anchoring devices (57);

with regard to claim 22,

wherein the anchoring devices are locking mechanisms;

with regard to claim 23,

wherein each block is unitary; and

with regard to claim 24,

wherein the aperture is positioned on the block to form a design.

Willemesen '687 discloses all of the features of the claimed invention with the exception(s) of:

with regard to claim 13,

vegetation seeds in the fill material; and

a plurality of apertures.

With regard to claim 13, it would have been obvious to one having ordinary skill in the art of containment at the time of invention to modify the device shown by Willemesen '687 such that it would further include vegetation seeds in the fill material. The motivation would have been to contain a seed and fill mixture within the device.

With regard to claim 13, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the device shown by Willemesen '687 such that it would include a plurality of apertures since it has been held that mere duplication of the essential working parts of a device involves only routine skill in the art. *St. Regis. Paper Co. v. Bemis Co.*, 193 USPQ 8.

Double Patenting

4. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent

possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

5. Claims 1, 2, 3, 4, 5, 6, 7, 9, 10, 11 and 12 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1 or 7, 2, 3, 4, 5, 6, 8, 11, 12, 13 and 14 of U.S. Patent No. 6,571,529 B2. Although the conflicting claims are not identical, they are not patentably distinct from each other.

With regard to claim 1, it would have been obvious to one having ordinary skill in the art of retaining walls at the time the invention was made to modify the method claimed by U.S. Patent No. '529 such that it would include a plurality of apertures. The motivation would have been to provide openings for plant growth.

With regard to claim 1, it would have been obvious to one having ordinary skill in the art of retaining walls at the time the invention was made to modify the method claimed by U.S. Patent No. '529 such that it would include fill material and vegetation seeds. The motivation would have been to plant the block.

6. Claims 1, 2, 3, 4, 13, 15 and 16 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 15 or 17, 15, 17, 18, 19, 19 and 19 of U.S. Patent No. 6,695,544 B2. Although the conflicting claims are not identical, they are not patentably distinct from each other.

With regard to claim 1, it would have been obvious to one having ordinary skill in the art of retaining walls at the time the invention was made to modify the device claimed by U.S. Patent No. '544 such that it would include a plurality of apertures. The motivation would have been to provide openings for plant growth.

With regard to claim 1, it would have been obvious to one having ordinary skill in the art of retaining walls at the time the invention was made to modify the device claimed by U.S. Patent No. '544 such that it would include fill material and vegetation seeds. The motivation would have been to plant the block.

7. Claims 13, 14, 15, 17, 18, 19, 20, 21, 22 and 23 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1 or 3, 2, 4, 7, 8, 9, 10, 11, 12 and 14 of U.S. Patent No. 6,817,154 (formerly copending Application

No. 10/331,407). Although the conflicting claims are not identical, they are not patentably distinct from each other.

With regard to claim 13, it would have been obvious to one having ordinary skill in the art of retaining walls at the time the invention was made to modify the device claimed by U.S. Patent No. '154 such that it would include a plurality of apertures. The motivation would have been to provide openings for plant growth.

With regard to claim 13, it would have been obvious to one having ordinary skill in the art of retaining walls at the time the invention was made to modify the device claimed by U.S. Patent No. '154 such that it would include fill material and vegetation seeds. The motivation would have been to plant the block.

Allowable Subject Matter

8. Claim 8 is objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

9. As allowable subject matter has been indicated, applicant's reply must either comply with all formal requirements or specifically traverse each requirement not complied with. See 37 CFR 1.111(b) and MPEP § 707.07(a).

Response to Arguments

10. Applicant's arguments filed 03 January 2005 have been fully considered but they are not persuasive.

In response to Applicant's statements that Willemsen '687 fails to provide motivation to lead a person having ordinary skill in the art to provide the block with apertures, the Examiner contends that Willemsen '687 teaches an aperture (66) as set forth above.

In response to applicant's argument that the references fail to teach certain limitations of applicant's invention, it is noted that the limitations upon which applicant relies (i.e., seeds intended to grow to the block exterior from the plurality of apertures positioned on the retaining wall block) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

In response to Applicant's statements that U.S. Patent No. '527 fails to provide motivation to lead a person having ordinary skill in the art to provide the block with apertures and to include fill material and vegetation seeds, the Examiner directs Applicant to claims 7 and 17, respectively, of U.S. Patent No. '527. In view of the claims, the inclusion of vegetation seeds is considered to be well within the scope of the patented apparatus.

With regard to U.S. Patent No. '544, Applicant merely traverses the rejection of claims 1 through 4 and 13 through 16 but fails to provide arguments in support thereof.

Conclusion

11. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Tara L. Mayo whose telephone number is 703-305-3019. The examiner can normally be reached on Monday through Friday 8:30 AM to 5:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Thomas B. Will can be reached on 703-308-3870. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


TLM
23 March 2005


ROBERT E. PEZZUTO
PRIMARY EXAMINER